In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 901

GERALD STANLEY SHERMAN AND RICHARD HENRY HOLLAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1970. A petition for rehearing was denied on September 29, 1970. The petition for a writ of certiorari was filed on October 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

410-059—70

QUESTIONS PRESENTED

1. Whether there was probable cause to believe that petitioners' vehicle was carrying contraband so as to justify its search without a warrant.

2. Whether, in the circumstances of this case, the court erred in instructing the jury that they could infer from proof of possession of marijuana in the United States that the marijuana had been unlawfully imported.

3. Whether the evidence was sufficient to convict petitioner Holland of violation of 21 U.S.C. 176a.

4. Whether the court erred in denying a severance.

5. Whether the requirement that marijuana be presented to customs officers for inspection at the point of entry into the United States violates the Fifth Amendment privilege against self-incrimination.

6. Whether a retrial following a mistrial subjected petitioners to double jeopardy.

7. Whether imposition of mandatory minimum sentences of five years' imprisonment constituted cruel and unusual punishment.

STATEMENT

On retrial [1] in the United States District Court for the District of Arizona, petitioners were convicted of receiving, concealing, and facilitating the transportation of eighty bricks of marijuana weighing one hundred fifty pounds, knowing that the marijuana

[1] The first trial, held on March 18, 1969, resulted in a mistrial when the jury failed to agree. The second trial, held on June 4, and 5, 1969, resulted in conviction of both petitioners.

had been unlawfully imported into the United States, in violation of 21 U.S.C. 176a.[2] On July 7, 1969, the court sentenced both petitioners to imprisonment for five years. The court of appeals affirmed (Pet. App.).

The evidence showed that on the evening of September 30, 1968, agent Everett Turner, a Customs Port Investigator stationed at Nogales, Arizona, received a call from a deputy sheriff, who stated that while on patrol in his vehicle he had observed three young men walking near an isolated area of the international boundary, about three miles from Nogales, notorious for narcotics smuggling (H. 6); when the deputy stopped to offer assistance, the men said they needed none and were out watching the stars. Shortly thereafter, as agent Turner drove toward Nogales, he was informed by radio that an officer of the Nogales Police Department had assisted three youths in the same area by driving them to a restaurant in Nogales (H. 8–9); they had told this officer they had been out rock hunting. Agent Turner then proceeded to the restaurant, where he began surveillance from a nearby parking lot. He notified Customs Investigators Clink and Dennis of his activities and requested their assistance (H. 9).

At approximately 12:45 a.m. on October 1, the two petitioners and a third unidentified young man left the restaurant and proceeded to the parking area of a nearby motel; there they entered an automobile and drove toward the border area (Tr. 87, 173).

[2] We are lodging with the Clerk the transcript of trial (Tr.) and of the hearing on petitioners' motion to suppress (H.)

Turner reported the license plate number and was informed that the vehicle belonged to a rental agency at the Tucson airport (Tr. 88). Approximately twenty minutes later the vehicle returned to the motel and Agent Turner observed that it was "noticeably lower in the rear than it had been when it left the motel" (H. 10–11). Petitioners and the other unidentified man left the rented vehicle and entered the restaurant, where they conversed with two other young men, who then returned with them to the motel (Tr. 90, 174–175). The three unidentified youths then drove off in another car and petitioners entered a motel room (Tr. 90, 174–175).

At about 9:00 a.m. the next day,[3] petitioners came out of the motel, entered the rented vehicle and drove north from Nogales (Tr. 176, 250–251). Approximately four miles north of the city, agents Dennis and Clink stopped petitioners' car (Tr. 176). Agent Turner arrived shortly thereafter (Tr. 117, 177), opened the rear door of the vehicle and immediately noticed a strong smell of marijuana (Tr. 118, H. 13). When asked for the key to the trunk, petitioners replied that they did not have one (Tr. 119, 178). One of the agents then drove the vehicle to a Nogales gasoline station (Tr. 119, 178), where a key for the trunk was made (Tr. 120, 179). Eighty bricks of marijuana

[3] At 3:30 a.m., agent Turner had gone to the motel's office, had a discussion with the clerk and determined that the occupants of the room, petitioners, had left a call to be awakened at 9:00 a.m. the next morning (Tr. 92). After ascertaining that petitioners had decided to go to sleep, the agents departed with the intention of resuming surveillance before 9:00 a.m. (Tr. 175).

weighing one hundred and fifty pounds were found in the trunk (Tr. 120–121, 179, 181; H. 15). Agent Turner then arrested petitioners and advised them of their rights (Tr. 121, H. 15).

ARGUMENT

1. On the facts summarized above, the court of appeals properly concluded that the officers had probable cause to believe that the vehicle was carrying contraband so as to justify the search without a warrant. See *Chambers* v. *Maroney*, 399 U.S. 42.

2. The court charged the jury that *knowledge* of illegal importation had to be found as a distinct element of the offense (Tr. 377). As to the *fact* of illegal importation, the court charged that the jury could so infer if it found beyond a reasonable doubt that the petitioners were in possession of the marijuana within the United States (Tr. 378). Petitioners' contention that the latter instruction violated their privilege against self-incrimination is similar to the issue raised in *Avey & Dean* v. *United States*, 428 F. 2d 1159 (C.A. 9), certiorari denied, November 9, 1970, No. 551, this Term.[1] Whatever the general validity of the statutory inference of actual importation, the inference was plainly permissible in this case, where the marijuana was discovered in a moving vehicle four miles north of the Mexican border, and there was further evidence showing petitioners' suspicious behavior at the border. Petitioners claim that the charge authorized conviction on proof less

[1] We refer the Court to our discussion of the issue in our brief in opposition in that case, a copy of which we are furnishing to petitioners' counsel.

than a reasonable doubt since the court failed to charge specifically that the jury must be convinced beyond a reasonable doubt of the correctness of the inference. But the judge made clear that the jury was not obliged to draw the inference:[5] the jury instructions stated clearly that a defendant is presumed to be innocent until proven guilty and that the burden of proving the guilt of the defendant beyond a reasonable doubt rests upon the prosecution (Tr. 369–370). This was sufficient to explain the jury's responsibility without additional specific comment on the reasonable doubt standard in relation to the statutory inference.

3. The claim of petitioner Holland that the evidence was insufficient to convict him of violating 21 U.S.C. 176a is premised upon the fact that the vehicle used to transport the marijuana was in co-petitioner Sherman's name and driven by him. Holland argues that there was no evidence that he knew of the marijuana in the trunk. The jury could, however, reasonably conclude from the evidence that petitioners, who were in continuous company of each other from the time they were first observed on Masonic Drive until their arrest, were participating in a joint venture. See *Eason* v. *United States,* 281 F. 2d 818 (C.A. 9).

4. The court did not abuse its discretion in denying petitioners' motion for a severance. Petitioners had been jointly indicted, and the evidence estab-

[5] The court told the jury that as against the statutory inference there was the possible contrary inference that the marijuana had not been imported contrary to law (Tr. 379).

lished a common course of conduct. No evidence was introduced which could not have been admitted if the petitioners had been separately tried. The court charged the jurors to give individualized consideration to the evidence as it applied to each petitioner (Tr. 368).

5. Petitioners' contention that the requirement that marijuana be presented to customs officers for inspection at the point of entry into the United States violated their Fifth Amendment privilege against self-incrimination has been uniformly rejected. Had petitioners made the required declaration with respect to merchandise brought from abroad, the marijuana would have been confiscated before entry. *Witt* v. *United States*, 413 F. 2d 303 (C.A. 9), certiorari denied, 396 U.S. 932; *Walden* v. *United States*, 417 F. 2d 698 (C.A. 5); *United States* v. *Jetter*, 421 F. 2d 839 (C.A. 9); *United States* v. *Gabaldon*, 424 F. 2d 1369 (C.A. 9).

6. The claim that petitioners were subjected to double jeopardy by being retried after the first jury failed to agree has been consistently rejected from the time of *United States* v. *Perez*, 9 Wheat. 579. See *United States* v. *Tateo*, 377 U.S. 463, *Wade* v. *Hunter*, 336 U.S. 684.

7. The claim that the five-year mandatory minimum prison sentence constituted cruel and unusual punishment was also raised in *Avey & Dean* v. *United States*, No. 551, this Term, certiorari denied, November 9, 1970. Absent conclusive scientific evidence tending to undermine the legislative conclusion that conduct such as that by petitioners presents a danger

to society warranting the type of punishment imposed, the five-year mandatory sentence cannot be considered cruel or unusual.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should therefore be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

NOVEMBER 1970.

U. S. GOVERNMENT PRINTING OFFICE, 1970